(2)

No. 87-699

IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1987

THE STATE OF MARYLAND DEPARTMENT OF HEALTH AND MENTAL HYGIENE OF THE STATE OF MARYLAND,

Petitioners,

v.

CHARLES ANDERSON,

Respondent.

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SUPREME COURT, U.S.

ON WRIT OF CERTIORARI
TO THE COURT OF APPEALS OF MARYLAND

MOTION FOR LEAVE TO PROCEED
IN FORMA PAUPERIS

The Petitioner, CHARLES ANDERSON, who is indigent and who has been found to meet the qualifications for representation by the Office of the Public Defender for the State of Maryland, asks leave to file the attached Petition for Writ of Certiorari to the Court of Appeals of Maryland without prepayment of costs and to proceed in forma pauperis pursuant to Rule 46.

The Petitioner's affidavit in support of this Petition is attached hereto.

GEORGE E. BURNS, JR.
Assistant Public Defender
Appellate Division, 6th Flr.
201 St. Paul Place,
Baltimore, Maryland 21202
(301) 333-4842

Counsel for Petitioner

No.

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ON WRIT OF CERTIORARI

TO THE COURT OF APPEALS OF MARYLAND

AFFIDAVIT IN SUPPORT OF MOTION TO PROCEED
ON APPEAL IN FORMA PAUPERIS

I, CHARLES ANDERSON, being first duly sworn, depose and say that I am the Respondent, in the above-entitled case; that in support of my motion to proceed on appeal without being required to prepay fees, costs or give security therefor, I state that because of my poverty I am unable to pay the costs of said proceeding or to give security therefor; that I believe I am entitled to redress.

I further swear that the responses which I have made to the questions and instructions below relating to my ability to pay the cost of prosecuting the appeal are true.

1. Are you presently employed?
Yes, in therapuhc workshop

(a) If the answer is yes, state the amount of your salary or wages per month and give the name and address of your employer.
Clifton T. Perkins Hospital workshop
$15.00 per week (approx.)

(b) If the answer is no, state the date of your last employment and the amount of the salary and wages per month which you received.

2. Have you received within the past twelve months any income from a business, profession or other form of self-employment, or in the form of rent payments, interest, dividends, or other source? ___
no

(a) If the answer is yes, describe each source of income and state the amount received from each during the past twelve months.

3. Do you own any cash or checking or savings account? yes

(a) If the answer is yes, state the total value of the items owned.
$800 savings in hospital account

4. Do you own any real estate, stocks, bonds, notes, automobiles, or other valuable property (excluding ordinary household furnishings and clothing)?
no

(a) If the answer is yes, describe the property and state its approximate value.

_____

_____

_____

5. List the persons who are dependent upon you for support and state your relationship to those persons.

_____

_____

_____

I understand that a false statement or answer to my questions in th is affidavit will subject me to penalties for perjury.

Charles Anderson
CHARLES ANDERSON

Subscribed and sworn to before me, a Notary Public this 27th day of JANUARY, 1988.

Ilene L Sherman
NOTARY PUBLIC

My Commission Expires:
July, 1990

Let the applicant proceed without prepayment of costs or fees or the necessity of giving security therefor.

_____
JUSTICE

No. 87-699

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ON WRIT OF CERTIORARI
TO THE COURT OF APPEALS OF MARYLAND

Alan H. Murrell
Public Defender

George E. Burns, Jr.
Assistant Public Defender
Appellate Division, 6th Flr.
201 St. Paul Place
Baltimore, Maryland 21202
(301) 333-4842

George M. Lipman
Assistant Public Defender

Attorneys for Respondent

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ISSUE PRESENTED

Does the ex post facto clause prohibit a change in the burden of proof used to determine whether one committed to a maximum security mental hosptial on the basis of being found not guilty by reason of insanity is entitled to release?

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BRIEF IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI

The Respondent, by his attorneys, George E. Burns, Jr., and George M. Lipman, Assistant Public Defenders, requests that the Petition for Writ of Certiorari denied because no substantial federal question warranting review has been presented.

STATEMENT OF THE CASE

The relevant facts are set forth in the Petition for Writ of Certiorari and the opinion of the Court of Appeals included as Appendix A to the Petition.

REASONS FOR DENYING THE PETITION

I.

THE EX POST FACTO CLAUSE PROHIBITS A CHANGE IN THE BURDEN OF PROOF USED TO DETERMINE WHETHER ONE COMMITTED TO A MAXIMUM SECURITY MENTAL HOSPITAL ON THE BASIS OF BEING FOUND NOT GUILTY BY REASON OF INSANITY IS ENTITLED TO RELEASE.

Most aspects of ex post facto law were conceded by the State of Maryland prior to the decision of the Court of Appeals. Indeed, the Court of Appeals noted that the actual question in dispute was very narrow.

> The State, while not disputing that the the change in the burden of proof operates to Anderson's disadvantage, contends that the ex post facto prohibition is inapplicable because his confinement in a mental hospital does not constitute "punishment." (Petition at 11A).

Further, the resolution of this limited question by the Court of Appeals turned on the construction of Maryland law.

> Considering the nature of that confinement under Maryland law, and particularly the fact that it represents the disposition portion of an adverse judgment in a criminal case, ... we believe that the confinement does implicate the ex post facto prohibition. (Citation omitted.) (Petition at 28A.)

The Court's conclusion is simply a recognition of the reality of Maryland law. See Pouncey v. State, 297 Md. 264, 270, 465 A.2d 475 (1983) ("[t]he legislature, however, has not seen fit to remove all consequences of committing a

criminal act while insane"). Noteworthy, among these consequences is confinement[1] subject to the application of Maryland Code, Article 27, §139(a)(3) (1987 Cum. Supp.):

> If any individual escapes from a facility of the Department of Health and Mental Hygiene after commitment as incompetent to stand trial or not criminally responsible, the individual is guilty of a felony and on conviction is subject to confinement in the State penitentiary or a jail or house of correction for a period not exceeding 10 years.

It is difficult to see how branding a reluctant "patient" a felon, and sentencing him to ten years imprisonment, is a rational part of psychiatric treatment. In light of the classically penal aspect of Respondent's confinement, it is clear why that the Court of Appeals concluded that, under Maryland law, punishment as well as treatment underpins the confinement of criminal committees.

The holding of the Court of Appeals is also consistent with this Court's holdings. In Jones v. United States, 463 U.S. 354 (1983), this Court concluded that due process did not require that the procedures governing the commitment and release of those committed as a result of criminal

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[1] Confinement is at the Clifton T. Perkins Hospital Center.

> This is a maximum security hospital; its purpose is to receive persons committed as a result of criminal prosecution or inmates from prisons who need psychiatric hospitalization. (Petition at 25A-26A.)

proceedings, and those committed as a result of civil proceedings be identical, the reason being the criminal committee has been found to have committed an act that constitutes a criminal offense. Id. at 363-366. Thus, the reason that the State of Maryland may constitutionally make the conditions of the criminal committee's confinement and release more onerous rests on of his status as a "criminal."

In sum, the decision of the Court of Appeals rests on the amply supported conclusion that Respondent is being punished as well as treated because he was found to have committed a criminal act. It is at best doubtful whether this decision involves a federal question. See Lindsey v. Washington, 301 U.S. 397, 400 (1937) (in applying ex post facto prohibition to State laws, Supreme Court accepts meaning ascribed to such laws by the highest court of the State). In any event, the decision of the Court of Appeals is nothing more than a simple application of the ex post facto clause as summarized by this Court last term.

> Article I of the United States Constitution provides that neither Congress nor any State shall pass any "ex post facto Law." See Art. I, §9, cl. 3; Art. I, §10, cl. 1. Our understanding of what is meant by ex post facto largely derives from the case of Calder v. Bull, 3 Dall. 386 (1798), in which this Court first considered the scope of the ex post facto prohibition. In Calder, Justice Chase noting that the expression "ex post facto" "had been in use long before the revolution," id., at 391, summarized his understanding of what fell "within the words and the intent of the prohibition":
>
> "1st. Every law that makes an action done before the passing of the law, and

> which was innocent when done, criminal; and punishes such action. 2d. Every law that aggravates a crime, or makes it greater than it was, when committed. 3d. Every law that changes the punishment, and inflicts a greater punishment, than the law annexed to the crime, when committed. 4th. Every law that alters the legal rules of evidence, and receives less, or different testimony, than the law required at the time of the commission of the offense, in order to convict the offender." Id., at 390, 1 L.Ed. 648 (emphasis omitted).

Miller v. Florida, U.S. ___, 96 L.Ed.2d 351, 359 (1987).

CONCLUSION

The State of Maryland is without question aggrieved; however, it has offered no substantial reason as to why this Court should consider its grievances. The Petition should, therefore, be denied.

Respectfully submitted,

Alan H. Murrell
Public Defender

George E. Burns, Jr.
Assistant Public Defender

George M. Lipman
Assistant Public Defender

Attorneys for Respondent

CERTIFICATE OF SERVICE

I HEREBY CERTIFY THAT on this 29th day of January, 1988, a copy of the foregoing Brief and Appendix in Opposition to Petition for Writ of Certiorari was delivered to C. Frederick Ryland, Assistant Attorney General, 300 West Preston Street, Suite 302, Baltimore, Maryland 21201, Counsel for Petitioners.

George E. Burns, Jr.
Assistant Public Defender

George M. Lipman
Assistant Public Defender